

U.S. Department of Labor

Office of Administrative Law Judges
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DATE: March 17, 2000

CASE NO: 1999-INA-286

In the Matter of

DR. AND MRS. SETH SHAPIRO
Employer

on behalf of

MARY ESPERANZA MAMANI
Alien

Appearances: Steve Polatnick, Esq., Attorney for Employer

Certifying Officer: Floyd Goodman, Region IV

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Dr. and Mrs. Seth Shapiro's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able,

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On November 26, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Florida Department of Labor and Employment Security ("FDOLES") on behalf of the Alien, Mary Esperanza Mamani. (AF 64-65). The job opportunity was listed as "Live-in Child Monitor". The job duties were described as follows:

Attends 3 children, ages 6, 3, and 2, in private home. Prepares meals, washes clothes, provides recreation, gives care when sick, provides adult supervision when parents are absent.

(AF 64). The stated job requirements for the position, as set forth on the application, included a grade school education and 2 years of experience in the job offered. (Id.). Other special requirements were listed as: "Must live-in at Employer's house Tuesday-Saturday." (Id.).

The CO issued a Notice of Findings ("NOF") on February 17, 1999, proposing to deny the certification for two reasons. (AF 36-38). First, the CO found that the live-in requirement was unduly restrictive and instructed the Employer to establish the business necessity for this requirement. (AF 37). Second, the CO noted that the requirement of two years experience in the job offered is unduly restrictive as it is above the maximum years of education, training, and experience required for this job based on the Dictionary of Occupational Titles ("DOT"). (AF 38). The CO found that the maximum education, training, and experience based on the DOT is a level of 3 "Over one month up to and including three months". The Employer was instructed to either prove business necessity for requirements in excess of three months or to drop the requirement and readvertise.

The Employer submitted its rebuttal on March 31, 1999. (AF 10-25). The Rebuttal consisted of sworn affidavits of the Employers asserting the business necessity for both the live-in requirement and the experience requirement. (AF 14, 35). In addition, the Employer submitted several documents establishing the Employers' weekly schedules which included several weekend and

evening activities and several work related out-of-town trips. (AF 15-34). The Employer responded to the CO's finding of an unduly restrictive experience requirement by asserting that:

I have been informed that the experience requirement for this job is normally 30 to 90 days. However, I have 3 small children all whose ages are 6 years or younger. This requires an experienced person capable of taking care of all of them at once. Also, the absences of myself and my husband described above mean that the employee will be in continuous intensive contact with the children without supervision. I, therefore, cannot feel comfortable with someone with only 60 days of experience who might have taken care of one or two older children. I require a more proven Child Monitor with a minimum two years experience under similar circumstances with an unimpeachable resume.

(AF 35).

The CO issued a Final Determination ("FD") on April 13, 1999, denying certification. (AF 8-9). The CO reviewed the Employer's rebuttal and found that the documentation provided by the employer after the NOF was sufficient to support business necessity for the live-in requirement. (AF 9). The CO also found, however, that with respect to the two years of experience requirement, the Employer's rebuttal does not show that either the experience requirements were common for the occupation in the United States and that the DOT is in any way flawed in its determination of the SVP level for a Child Monitor or that the requirements were justified by an absolute necessity. The CO found that the Employer's rebuttal "only states what is the employer's preference for the position." (Id).

The Employer filed a Request for Review on May 14, 1999. (AF 1-7). On October 1, 1999, Employer submitted a Brief in Support of Appeal to the Board of Alien Labor Certification Appeals ("Board").

Discussion

In the NOF, the CO found that the two year experience requirement was unduly restrictive because it exceeded the normal SVP requirement for the position of "Child Monitor." The CO provided then Employer with the options of either deleting the restrictive requirement or establishing that the requirement is justified by business necessity. The issue presented by this appeal is whether the requirement that applicants possess two years of experience in the job offered is unduly restrictive under section 656.21(b)(2).

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The purpose of 656.21(b)(2) is to make a job opportunity available to qualified U.S. workers. *Venture International Associates*, 87-INA-569 (Jan. 13, 1989) (*en banc*). An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles unless it establishes a business necessity for the requirement.

Specific Vocational Preparation (“SVP”) is defined in Appendix C of the DOT as “the amount of lapsed time required by a typical worker to learn the techniques, acquire the information and develop the facility needed for average performance in a specific job worker situation.” DICTIONARY OF OCCUPATIONAL TITLES at 1009. The SVP for Child Monitor¹ is listed in the DOT as 3, meaning over one month up to and including three months. (Id.). Thus, the Employer’s requirement of two years experience is not included in the DOT and must be adequately documented as arising from business necessity.

The Board defined how an employer can show “business necessity” in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer’s business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Vague and incomplete rebuttal documentation will not meet the employer’s burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991). Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige, & Associates, Inc.*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 90-INA-395 (June 30, 1992).

In the instant case, the Employer has not furnished the documentation called for in the NOF to establish a business necessity for the two year experience requirement. In its Rebuttal, the Employer asserted that because they had three young children, they required an experienced person capable of caring for all of them at once and would not “feel comfortable with someone with only 60 days of experience who might have taken care of one or two older children.” (AF 35). Employer has not documented that an applicant with 3 months of experience would not be capable of caring for three children at once, nor has Employer documented that such an applicant would only have experience caring for one or two older children.

Here, Employer has done no more than make unsubstantiated assertions that the position requires two years experience.² In order to demonstrate business necessity an employer must show

¹ The DOT description of a Child Monitor (alternate titles: nurse, children’s), Code 301.677.010, states:

Performs any combination of following duties to attend children in private home: Observes and monitors play activities or amuses children by reading to or playing games with them. Prepares and serves meals or formulas. Sterilizes bottles and other equipment used for feeding infants. Dresses or assists children to dress and bathe. Accompanies children on walks or other outings. Washes and irons clothing. Keeps children’s quarters clean and tidy, Cleans other parts of home. May be designated Nurse, Infants’ (domestic ser.) when in charge of infants. May be designated baby Sitter (domestic ser.) when employed on daily or hourly basis. GOE: 10.03.03 STRENGTH: M GED: R3 M1 L2 SVP: 3 DLU: 81

² On appeal, Employer argued that in the South Florida community it is common place for employers of prospective child monitors to seek individuals with two years or more of experience.

factual support or a compelling explanation. *ERF. Inc.*, 89-INA-105 (Feb. 14, 1990). Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *See generally, Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 89-INA-490 (Sept. 1, 1989), citing *Tri-P's Corp., dba Jack-In-The-Box*, 87-INA-686 (Feb. 17, 1989). Here, the Employer submitted insufficient evidence on rebuttal to support its assertions regarding business necessity. Consequently, we agree with the CO that the Employer has not established a basis for his restrictive experience requirement. It follows that the application for labor certification was properly denied.

Order

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California

Employer then submitted a letter from an employment agency specializing in placing domestic workers and nannies to establish that the prevailing practice in the area is to require two years of experience. This information, however, was submitted for the first time on appeal, and as an appellate body we cannot consider information that was not before the CO. *See La Prairie Mining Ltd.*, 95-INA-11 (Apr. 4, 1997).